(26,573)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 487.

MARY E. REX, ADMINISTRATRIX OF JAMES A. IVIE, DECEASED, APPELLANT,

vs.

THE UNITED STATES AND THE UTE INDIANS.

APPEAL FROM THE COURT OF CLAIMS.

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1 I.—*Petition. Filed September* 21, 1917.

In the Court of Claims.

No. 10842, Ind. Dep.

MARY E. REX, Administratrix, JAMES A. IVIE, Deceased,

vs.

THE UNITED STATES and THE UTE INDIANS.

Sep. 21, 1917.

Petition.

To the Court of Claims:

The petition of Mary A. Rex, Administratrix of James A. Ivie would respectfully show as follows:

1. That the said deceased, James A. Ivie, was a citizen of the United States, and in the year 1866, and on or about the 10th of June, of that year, was living in Selina County, Utah, and engaged in the business of farming and stock raising.

2. That the said Ivie has died intestate, and your petitioner has been duly appointed as the administrator of his estate.

(See letters administration filed in case of James A. Ivie, Ind. Dep. No. 702.)

3. That on the said 10th day of June, 1866, or thereabouts, in Salina County, Utah, the following property belonging to petitioners intestate, was taken from him, or destroyed, by Indians belonging to and known as Black Hawk's Band, composed largely of renegade Indians belonging to the Ute tribe of Indians of the then Territory of Utah:

2

6 head of mules (4 mouse color, 1 sorrel, 1 gray, 15 hands high, about 1200 pounds, 3 to 5 years old) at $200	$1,200
1 stallion, thoroughbred, chestnut sorrel, 16½ hands high, 5 years old 1200-1300 lbs.	1,000
33 brood mares, American, Kentucky whip—19 bays, 3 creams, 5 sorrels, 4 dapple grays, 2 blacks, 4 to 6 years old, 15 to 17 hands high 1200 to 1300 lbs., at $200	6,600
2 geldings, American stock, 1 chestnut sorrel, 1 brown, 15½ hands high, 5 to 6 years old, weighing 1200 lbs., at $200	400

8	two-year-olds, mostly blacks and bays, geldings and mares, at $75	600
6	yearlings, mostly blacks and bays, at $50	300
5	blooded bulls, "Durham," weighing about 1800-2000 lbs., various colors, imported, at $150	750
36	head 3-year-old steers, about 1450 lbs., various colors, at $60	2,160
33	head 2-year-old steers and heifers, at $40	1,320
34	head yearling steers and heifers, at $25	850
152	head cows, high grade, at $50	7,600
	Of the total value	$22,780

That on the date of said depredation Black Hawk's band of Ute were members of the Ute tribe of Indians, which said tribe on the date of said depredation was in amity with the United States.

4. Your petitioner would further show, that the said decedent, James A. Ivie, in his lifetime, on the 10th day of April, 1889, in compliance with the laws in such cases made and provided,
3 filed a claim for the value of the property thus taken and destroyed by said Indians, with the Secretary of the Interior—in the Interior Department of the United States at Washington, D. C., together with such evidence in support of said claim, as was required under the rules and regulations of said Department made with reference to the filing of such claims. The claim was numbered 5310 in said Department.

Although directed by law to investigate, inquire into, and to report to Congress its conclusions upon this and other like claims no action whatever was had thereon.

5. Under the Indian Depredations act of March 3, 1891 (26 Stat. L., p. 851), the said James A. Ivie promptly filed said claim in this court, being numbered 702, Indian Depredations, upon the dockets of this court.

With equal promptness he secured the testimony of witnesses under the rules of the court.

6. Thereafter, upon the evidence being closed upon the part of the claimant and defendant, and upon submission of the case and upon briefs and a former decision of the court, on June 13, 1898, the petition was dismissed by the court with the following finding:

"This case having been heard by the Court of Claims and it appearing that at the time of the alleged depredation, to wit: on or about the 10th of June, 1866, Black Hawk's band (by members of which the same was committed, if at all, was not in amity with the United States.

"It is ordered, by authority of Herring's case (32 C. Clms., 536), that the petition be dismissed for want of jurisdiction."

Your petitioner would further show that on the 11th day of January, 1915 (38 Stat. L., p. 791) the said act of March 3, 1891, was amended and by the terms of such amendment, this Court
4 was then invested with jurisdiction to hear and determine and award judgment in claims which had been filed in the

Court of Claims where the claimant, at the time he suffered his depredation, was an inhabitant of the United States (if not an Indian in tribal relations), or where the depredation had been committed by Indians of a tribe in amity with the United States.

7. Petitioner prays that the said claim, No. 702, heretofore dismissed, be consolidated with this suit, and all papers filed therein be transferred to the files in this case; and that upon a final hearing hereof, and upon this petition, and upon the evidence heretofore taken and filed in No. 702, that judgment be awarded to her as administratrix aforesaid, and against the Ute tribe of Indians and the United States for the sum of $22,780.

Petitioner further prays that all pleadings and proceedings had by this court in said case No. 702, insofar as the same are necessary in the instant case, in its determination under the said act of January 11, 1915, be made a part hereof.

And for any and all other and further relief, upon final determination, as to this court petitioner may be deemed justly and legally entitled.

MARY E. REX,
Administratrix, James A. Ivie, Deceased.
By HARRY PEYTON,
Attorney.

THE DISTRICT OF COLUMBIA, *ss:*

This day personally appeared before the undersigned, John F. A. Becker, a notary public in and for the district aforesaid, the within named Harry Peyton, who being by me duly sworn, upon oath states that he is the lawfully constituted attorney for the petitioner in the above cause (see power of attorney filed in James A. Ivie,
5 No. 702 Ind. Dep.), and that, upon information and belief, the allegations of the petition herein are true.

HARRY PEYTON,
Attorney for Petitioner.

Sworn to and subscribed to before me this 20th day of September, 1917.

JOHN F. A. BECKER,
Notary Public, District of Columbia.

6 II.—*Demurrer. Filed November* 6, 1917.

Defendants' Demurrer.

Now come the defendants, by the Assistant Attorney General, and demur to the petition in the above-entitled cause, on the ground that the same does not state a cause of action.

HUSTON THOMPSON,
Assistant Attorney General.

GEO. T. STORMONT,
Assistant Attorney.

III.—*Argument and Submission of Demurrer.*

On February 25, 1918, the demurrer was argued and submitted by Mr. George T. Stormont, for the defendants, and Mr. Harry Peyton, for the claimant.

7 IV.—*Opinion of the Court by Booth, J., on Demurrer. Filed March* 18, 1918.

BOOTH, *Judge*, delivered the opinion of the court.

The petition in this case raises a jurisdictional issue and is here on defendants' demurrer. The plaintiff alleges a loss of considerable personal property on June 10, 1866, at the hands of Black Hawk's Band of Ute Indians, the habitat of the Indian tribe being in the then Territory of Utah. A claim for this loss was filed with the Secretary of the Interior on April 10, 1899, and subsequently a petition was duly filed in this court under the Indian Depredation statute of March 3, 1891, 26 Stat., 851.

This court in Herring's case, 32 C. Cls., 536, found Black Hawk's Band of Ute Indians to have been in a state of hostility on the date named in the above petition, and following this decision the plaintiff's then pending case was dismissed.

The act of March 3, 1891, commonly styled the Indian Depredation statute, is as follows:

"That in addition to the jurisdiction which now is, or may hereafter be, conferred upon the Court of Claims, said court shall have and possess jurisdiction and authority to inquire into and finally adjudicate, in the manner provided in this act, all claims of the following classes, namely:

First. All claims for property of citizens of the United States taken or destroyed by Indians belonging to any band, tribe, or nation in amity with the United States, without just cause or provocation on the part of the owner or agent in charge, and not returned or paid for.

Second. Such jurisdiction shall also extend to all cases which have been examined and allowed by the Interior Department and also to such cases as were authorized to be examined under the act of Congress making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes for the year ending June thirtieth, eighteen hundred and eighty-six, and for other purposes, approved March third, eighteen hundred and eighty-five, and under subsequent acts, subject, however, to the limitations hereinafter provided.

8 Third. All just offsets and counterclaims to any claim of either of the preceding classes which may be before such court for determination.

SEC. 2. That all questions of limitations as to time and manner of presenting claims are hereby waived, and no claim shall be ex-

cluded from the jurisdiction of the court because not heretofore presented to the Secretary of the Interior or other officer or department of the Government: Provided, That no claim accruing prior to July first, eighteen hundred and sixty-five, shall be considered by the court unless the claim shall be allowed or has been or is pending, prior to the passage of this act, before the Secretary of the Interior or the Congress of the United States, or before any superintendent, agent, subagent, or commissioner, authorized under any act of Congress to inquire into such claims; but no case shall be considered pending unless evidence has been presented therein: And provided further, That all claims existing at the time of the taking effect of this act shall be presented to the court by petition, as hereinafter provided, within three years after the passage hereof, or shall be thereafter forever barred: And provided further, That no suit or proceeding shall be allowed under this act for any depredation which shall be committed after the passage thereof. * * *

On January 11, 1915, 38 Stat., 791, Congress amended the Indian Depredation statute by the following enactment:

"That the first section of paragraph one of an act entitled 'An act to provide for the adjudication and payment of claims arising from Indian Depredations,' approved March third, eighteen hundred and ninety-one, be, and the same is hereby, amended so as to read as follows:

"First. That in all claims for property of citizens or inhabitants of the United States, except the claims of Indians heretofore or now in tribal relations, taken or destroyed by Indians belonging to any tribe in amity with and subject to the jurisdiction of the United States without just cause or provocation on the part of the owner or agent in charge, and not returned or paid for, and in all adjudications under said act as now amended, the alienage of the claimant shall not be a defense to said claim: Provided, That the privileges of this act shall not extend to any person whose property at the time of its taking was unlawfully within the Indian country: Provided further, That all cases heretofore filed under said act of March third, eighteen hundred and nine-one, and which have been dismissed by the court for want of proof of the citizenship of the claimant or alienage shall be reinstated and readjudicated in accordance with the provisions of this act: Provided further, That nothing in this act shall be construed to authorize the presentation of any other claims than those upon which suit has heretofore been brought in the Court of Claims: Provided further, That all acts and parts of acts in so far as they conflict with the provisions of this act are hereby repealed."

On September 2, 1917, the present petition was filed, the allegations differing from the prior petition only with respect to the question of amity, the contention being that the omission from the act of January 11, 1915, supra, of the word "band" was intentionally done to enlarge the jurisdiction of the court and extend redress to
9 all inhabitants wherein the loss was occasioned by any "tribe" of Indians in amity with the United States.

The development of legislation extending remedies and redress

to the early western settlers of the country for Indian depredations upon their property was decidedly gradual and evinces a legislative intent to guard both the right and the remedy by specific limitations. Commencing in 1796, 1 Stat., 472, and extending without material change to February 28, 1839, is found four statutes, in each of which there is an express reservation obviously intended to restrain the operation of the law and so circumscribe it that the Indians, or rather the Indian tribes themselves, should be penalized for the offense. The essential right of recompense for lost property has always been limited to thefts and depredations committed by friendly Indians, and any sort of mutual quarrel between the depredators and the depredated which constituted just cause or provocation for the crime was sufficient to bar both the right and remedy. The very nature of the claims seems to have exacted a scrutinizing care and evoked in every law several strict and imperative limitations. The earlier legislation withheld jurisdiction from the courts to try the cases, the claimant in each instance being relegated to the simple procedure of preferring his claim to the superintendent of the Indian reservation and he in turn, if unable to procure its adjustment, transferring the controversy to the President of the United States, in each instance requiring the positive showing of the amity of the tribe and the peaceful relations of the parties. Act of March 3, 1799, 1 Stat., 747; act of March 30, 1802, 2 Stat., 143.

The statute of June 30, 1834, 4 Stat., 731, the Trade and Intercourse Act, continued in effect the preceding laws, the only noticeable enlargement of the remedy being found in the section providing a method of proof. This statute contained a three-year limitation and directed an investigation by the Secretary of the Interior. The question of amity, as well as all other restrictions, were expressly retained.

The Congress on February 28, 1859, 11 Stat., 40, repealed all laws wherein the United States was held liable for Indian depredations and left the sufferers from such losses exclusively for indemnification out of the annuities of the Indian tribes, and this, despite the fact that in each of the earlier laws the inhabitants had been expressly guaranteed "eventual indemnification."

It was not until the passage of the statute of March 3, 1891, supra, granting jurisdiction to this court to hear and determine cases of this character, that any provision was made for their judicial determination. Section 2156, Revised Statutes, revived the ancient proceedings, but did not in any respect enlarge the scope of the right or remedy. The statute of 1891 is carefully drawn; it not only refers to the amity of the tribe as a prerequisite to recovery but introduces for the first time the amity of the "band." Not only was the hostility of the band or nation recognized but what is of more importance the right and remedy was expressly limited to citizens of the United States who had lost property through Indian depredations, thereby excluding claims of mere inhabitants. The act of 1891 abounds in limitations; it gives forth numerous indications of legislative intent to restrict this court to narrow channels in the adjudication of In-

dian claims and nowhere evidences a desire to place claims
10 of this character upon the unrestricted basis of most all other claims against the United States. In 1915 practically all of the cases coming within the terms of the act of 1891 had been adjudicated, several hundred presented under the law had been dismissed for noncitizenship, and Congress was especially confronted with the fact of what upon its face seemed a manifest unjust discrimination between a citizen of the United States and an inhabitant thereof when each under similar circumstances had been the loser by reason of Indian depredations.

The history of Indian depredation legislation negatives a congressional intent to do more than extend the right of recovery to a specific class of claimants under certain clear and well-defined conditions. If the act of January 11, 1915, was intended to enlarge our jurisdiction and revive numerous cases dismissed because of the proven hostility of the band of Indians committing the depredations, it would not have so preeminently treated the one issue of citizenship alone. Every single provision of the amendatory statute which changes the existing law is so apparently intended to revive the remedy in behalf of inhabitants who had been excluded by the act of 1891 that it seems free from doubt that Congress was alone concerned with this particular subject. Why say in the statute, "the alienage of the claimant shall not be a defense to said claim?" Why provide specifically for the reinstatement of all cases heretofore dismissed for want of proof of citizenship or alienage, and make no mention whatever of the volume of cases dismissed for the hostility of the band of Indians committing the crime? Indeed, if we are now invested with jurisdiction to try and determine the present case, what logical reason can be assigned for limiting the same to suits heretofore brought in this court? The petition herein is in effect a trial de novo, the filing of a new petition. Citizenship cases, on the contrary, are reinstatements automatically made in virtue of the statute; the records before the court were in practically all instances complete; nothing remained to be done but ascertain the question of judgment. If Congress intended after the lapse of twenty-four years by the amendatory legislation of 1915 to open for litigants of this class a new and enlarged jurisdiction it would not have obscured the intent by several provisions and provisos which in themselves have no direct or remote relationship to the question of amity whatever. Congress was dealing with the question of citizenship and with this question exclusively and alone. It is hardly possible to conceive that at this late day, and in the face of all prior legislative disposition towards claims of this class, the Congress was enacting a law designed to remove a restriction solemnly placed in the statute when the court for the first time was granted jurisdiction to hear these cases. The history of the passage of the act through Congress, its consideration by the committee, clearly discloses that the one purpose to be accomplished was the removal of the bar of noncitizenship. In the report of the committee (S. Rept. No. 720, 63d Cong., 2d sess.) the question of amity nowhere appears.

The intent of the legislature is the cardinal principle of statutory construction. If in the light of all the circumstances surrounding the passage of the law, including the whole history of the subject matter of legislation, the court can ascertain the legislative intent it must be effectuated in its judgment. We need indulge in no citations
11 to sustain this assertion. If the statute is ambiguous and subject to construction, the primary duty of the court is to ascertain the intended purpose of the statute, the mischief it was intended to remedy, and from all the facts and circumstances surrounding its enactment seek to discover the legislative intent and construe it accordingly.

We believe that carrying the amendatory act with its changed provisions into the original statute of 1891 bars the right of the plaintiff to maintain this suit, the same not having been brought within the three-year period.

Hay, Judge; Downey, Judge; Barney, Judge; and Campbell, Chief Justice, concur.

Defendants' demurrer is sustained. Petition dismissed. It is so ordered.

V.—*Judgment of the Court.*

At a Court of Claims held in the City of Washington on the Eighteenth day of March, A. D., 1918, it is ordered that the defendants' demurrer be sustained; and that the claimant's petition be and it hereby is dismissed.

BY THE COURT.

12 VI.—*Claimant's Application for and Allowance of an Appeal.*

Comes the plaintiff, by attorney, and prays an appeal to the Supreme Court of the United States from the judgment of this Court of March 18th, 1918, dismissing the petition herein filed.

HARRY PEYTON,
Attorney for Claimant.

Filed May 21, 1918.

Ordered: That the above appeal be allowed as prayed for.

May 21, 1918.

BY THE COURT.

13 Court of Claims.

Indian Depredation No. 10842.

MARY E. REX, Administratrix, James A. Ivie, Deceased,

vs.

THE UNITED STATES and THE UTE INDIANS.

I, Sam'l A. Putman, Chief Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the opinion of the court by Booth, J.; of the judgment of the court; of the claimant's application for, and allowance of, an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City, this Twenty-second day of May, A. D., 1918.

[Seal Court of Claims.]

SAM'L A. PUTMAN,
Chief Clerk Court of Claims.

Endorsed on cover: File No. 26,573. Court of Claims. Term No. 487. Mary A. Rex, administratrix of James A. Ivie, deceased, appellant, vs. The United States and The Ute Indians. Filed June 4th, 1918. File No. 26,573.

Supreme Court of the United States

No. 487

MARY E. REX, ADMINISTRATRIX OF JAMES A. IVIE, DECEASED, APPELLANT,

vs.

THE UNITED STATES AND UTE INDIANS APPELLEES

CLAIMANT'S STATEMENT OF CASE, ASSIGNMENT OF ERROR, BRIEF AND ARGUMENT

STATEMENT OF CASE

This is a case appealed from the judgment of the Court of Claims, and arose under what is commonly known as the Indian Depredation Act of March 3, 1891 (26 Stat. 851), as amended by the Act of January 11, 1915 (38 Stat. 791).

Appellant's intestate, James A. Ivie, a citizen of the United States, on June 10, 1866, while residing at the settlement of Scipio, Utah, suffered a depredation at the hands of Indians, members of the Ute tribe, and belonging to what was known as Black Hawk's band.

It has been held by the Court of Claims that at the time of this depredation the Ute tribe of Indians were in amity with the United States, and that Black Hawk's band was not in amity with the United States. In that connection it may be stated that the Ute tribe numbered several thousand, while Black Hawk's band was

> "A small band of outlaws, under a chief named Black Hawk. * * * Their number did not at first exceed 50 men * * * but accessions have been continually had from the more reckless Indians of different bands, so that their number has increased to about 60 men. They have made raids upon several of the small and defenseless settlements of the southern part of the Territory (Utah) for the purpose of stealing cattle and horses, fighting when pursued by the settlers, who sought to recover their stock. * * *" (Rep. Com. Ind. Aff., 1866, p. 124.)

It was in one of the these raids upon the settlement at Scipio that Ivie and a number of other settlers lost their property, principally live stock.

Ivie filed a claim for his loss with the Secretary of the Interior under the law and the rules and regulations of that Department, with evidence supporting same, but no action was taken thereon.

Availing himself of the privileges of the Indian Depredation Act of 1891, he promptly filed his claim, by petition, in the Court of Claims, with equal promptness he took the depositions of his witnesses, under the rules of the court, and prepared his case for trial, tried same and the petition was dismissed for want of jurisdiction.

It cannot, therefore, be said that he was, in the remotest degree, guilty of laches.

The Indian Depredation Act of 1891 provided, as a condition to the jurisdiction of the Court of Claims, that the

depredating Indians must have belonged to a *band,* tribe or nation in amity with the United States.

It has been held by the Court of Claims that the act of 1891 was purely jurisdictional. The liability statute was the Trade and Intercourse Act of 1834. (4 Stat. 731.)

Upon a trial of the case the petition was dismissed upon this order of the court below:

> "This case having been heard by the Court of Claims and it appearing that at the time of the alleged depredation, to wit, on or about the 10th day of June, 1866, Black Hawk's band (by members of which the same was committed, if at all) was not in amity with the United States.
>
> "It is ordered, by authority of Herring's case (32 C. Cls. 536) that the petition be dismissed for want of jurisdiction."

The jurisdictional part of the act of 1891 provided:

> "That is addition to the jurisdiction which is now, or may hereafter be, conferred upon the Court of Claims, said Court shall have and possess jurisdiction and authority to inquire into and finally adjudicate, in the manner provided in this act, all claims of the following classes, namely, First, All claims for property of citizens of the United States, taken or destroyed by Indians belonging to any band, tribe or nation in amity with the United States, without just cause or provocation on the part of the owner or agent in charge, and not returned or paid for."

The limitation in the act as to the time within which claims might be filed under the act in the Court of Claims is as follows:

> "Sec. 2. * * * And provided further, that all claims existing at the time of the taking effect of this act shall be presented to the court by petition, as here-

inafter provided, within three years after the passage hereof, or shall be thereafter forever barred. * * *"

In passing, it may be well to here state that the first legislation relating to payment of claims for depredations by Indians was the act of May 19, 1796 (1 Stat. 472).

This act promised eventual indemnification by the United States to citizens *or inhabitants* of the United States for the value of property taken or destroyed by Indians belonging to a *tribe* in amity with the United States.

This promise was renewed in 1799 (1 Stat. 747). In 1802 (2 Stat. 143). In 1834 (The Trade and Intercourse Act), 4 Stat. 731, which, as before stated, is the act to which the court looks for liability, the act of 1891 being jurisdictional.

Other acts dealing with liability of the United States for depredations by Indians, Sec. 2156 R. S. and the act of 1859 (11 Stat. 401) relate to the Indians in their *tribal* capacity.

It will be at once noted that these ancient promises failed of performance in the act of 1891 in two respects:

(a) It was not fulfilled as to *inhabitants*. By the terms of the act the court's jurisdiction was limited to claims of *citizens*, althought the promises had been extended to *inhabitants* as well as *citizens*.

(b) The condition as to amity was enlarged by the act so as to require, as a condition to the court's jurisdiction, that depredating Indians of a *band* as well as of a *tribe* must have been in amity. No such requirement, or limitations as to amity of a *band* was in the original promises of indemnity.

When we view the history of this legislation relating to claims for Indian depredations we must conclude that the Congress, by the act of 1891, was intending, at least in

part, to fulfill these promises and extend jurisdiction to the Court of Claims for this purpose. For many years authority had been given to the Interior Department to receive these claims, investigate them, and report its conclusions to Congress. Many claims were filed in this department, investigated and reported to Congress but comparatively few paid by appropriation.

The matter of the amity of a *band* was never a condition of any action had upon the claims by the Interior Department, though upon the appropriation act of 1885 (23 Stat. L., p. 376), the authority of the Secretary of the Interior to investigate and report upon these claims was limited to claims of citizens.

Another matter worthy of consideration as a reason on the part of Congress for amending the act of 1891, as amended by the act of 1915, as it related to the word "band," is found in the legislative proceedings that led up to the enactment of the law. It is assumed that the correctness of this statement relative thereto will be admitted by appellees.

The act of 1891 as finally passed, originated with H. R. 8150, 51st Cong., 2d Sess. This bill contained no jurisdictional requirement as to citizenship, or amity of either tribe, band or nation. It gave jurisdiction to the Court of Claims of "all claims for property taken or destroyed by Indians without just cause or provocation," etc.

As thus passed by the House, it was amended in the Senate as follows:

> "* * * all claims for property of citizens taken or destroyed by Indians of a band, tribe or nation in amity with the United States. * * *"

The Senate amendment was not concurred in by the House and the bill went to conference, the conferees on

the part of the Senate being Moody, Paddock and Faulkner; on the part of the House, Herman, Hare and Perkins.

Agreement was reached by the conferees upon the bill, and it was reported out and passed. *It is shown by the report of the conferees that the word band was eliminated from the bill.*

(See H. Rep. p. 3234, and S. Rep. p. 2924, Cong. Rec., 51st Cong., 2d. Sess.)

At a hearing before the Committee on Indian Affairs of the House, March 21, 1904, upon a bill to amend the act of 1891 as to amity and other matters, Mr. Herman, then a member of the House and one of its former conferees, stated that the word "band" was not in the bill as it was reported by the conferees.

Undoubtedly the word got in the bill through error in its engrossment and while the error—if such it was—did not affect the law as it was passed, it may be fairly urged as one of the reasons for the amendment in the act of 1915, eliminating the word "band."

The amendment of January 11, 1915, as it relates to cases not within the jurisdiction of the court under act of 1891, is as follows:

> "That the first section of paragraph one of the act, etc., * * * approved March 3, 1891, be and the same is hereby amended so as to read as follows:
>
> "First, That in all claims for property of citizens or *inhabitants* of the United States, except the claims of Indians heretofore or now in tribal relations, taken or destroyed by Indians belonging to any *tribe* in amity with and subject to the jurisdiction of the United States, etc." (Italics are mine.)

It will be noted that the act of 1891 is amended by this act in two respects:

(a) The court's jurisdiction is extended to claims of *inhabitants* as well as to citizens.

This is in keeping with all the original promises of indemnification; is in language identical with the early legislation upon the same subject, and extends the act of 1891 to cases of *inhabitants* as well as to citizens.

(b) The requirement that Indians of a *band* must have been in amity with the United States is no longer a condition to the court's jurisdiction.

Likewise this is in keeping with all the original promises of indemnification. Further, it corrects what was evidently an error in the bill as it was finally passed, as hereinbefore shown, by the Congressional Record.

The *limitation* as to the extent of the new jurisdiction given under the amendatory act of 1915 is as follows:

> "* * * That the privileges of this act shall not extend to any person whose property at the time of its taking was within the Indian country.
>
> "* * * That nothing in this act shall be construed to authorize the presentation of any other claims than those upon which suit has heretofore been brought in the Court of Claims."

Another proviso in the amendatory act, and which the court below seemed to think—it did not so decide—was the measure of its jurisdiction, is as follows:

> "* * * That all cases heretofore filed under said act of March 3, 1891, and which have been dismissed by the court *for want of proof of the citizenship of the claimant or alienage shall be reinstated* and readjudicated in accordance with the provisions of this act." (Italics mine.)

Under the act of 1891 as thus amended, and within three years after its passage by Congress, plaintiff in error filed

his petition in the Court of Claims (R. pp. 1-3), to which defendants demurred (R. p. 3) which demurrer was sustained by the court and the petition dismissed. (R. p. 8.)

The petition alleged all the necessary facts under the act of 1891 as amended by the act of 1915.

The petition was dismissed, not upon the ground that the court was without jurisdiction under the act of 1891 as amended, *but upon the theory that the suit was barred under the three year limitation of the act of 1891* (R. p. 8).

As shown by the petition now filed plaintiff in error filed his petition under the act of 1891, which the court below declined to consider for want of jurisdiction.

The court was never invested with *jurisdiction* of the suit until jurisdiction was given by the amendment of 1915. Unless the three year limitation of the act of 1891 is brought into the act as amended in 1915 (which would extend the time for filing the suit three years after the passage of the amendment, within which time this suit was brought), the only limitation as to time against filing the suit is the six-year statute under the court's general jurisdictional powers. The only limitation upon the power of the court below to consider cases within the jurisdiction conferred, is contained in the proviso wherein it is provided that the relief given should extend only to claims within the act that had theretofore been filed in the Court of Claims under the act of 1891. The plaintiff in error, as shown, had filed his suit under that act, and the same had been dismissed for want of jurisdiction.

ASSIGNMENT OF ERROR

It is hereby assigned as error committed by the Court of Claims:

(1) That the Court erred in holding that the suit was

barred under the three-year limitation within which the suit might be brought under the Indian Depredation Act of March 3, 1891 (26 Stat. 851);

(2) That the Court erred in sustaining the demurrer and dismissing the petition.

HARRY PEYTON,
Attorney for Appellant.

BRIEF AND ARGUMENT

While much is said in the opinion of the court below, regarding its jurisdiction under the amendatory act of January 11, 1915, and the effect of the proviso as to the reinstatement of non-citizenship cases being exclusive of such jurisdiction, the decision of the case is based upon the three-year limitation within which suits could be brought under the act of 1891. (R. p. 8.)

We think it may be stated as elemental that the statute of limitations generally does not begin to run until a complete right of action accrues; that is to say, from the time when a suit might be maintained. As to actions against the sovereign, which cannot be sued without its consent, the statute will not begin to run until such consent is given.

> If Congress give legal efficacy to a designated claim or class of claims which were not legal rights, or mere rights without a remedy, the statute of limitations begin to run from the passage of the enabling act, or the happening of some event prescribed therein. (Simmons V. U. S. 19 C. Cls. p. 602.)

It cannot be successfully maintained that the plaintiff in the court below ever had a right of action against the defendants (certainly he had no forum with jurisdiction to entertain his suit), until the amendatory act of ~~June~~ January 11, ~~1918~~ 1915.

The Court of Claims expressly held, when he attempted to present his claim under the act of 1891, that it did not have jurisdiction of his suit and dismissed his petition. Unless the court *assumes the jurisdiction* given it by the amendatory act of 1915, upon the petition filed, we have the anomalous situation that claimant is still without a forum within which to bring his suit, although jurisdiction has been given the Court of Claims to hear his case upon its merits.

With due respect to the decision of the court below it seems idle to contend that the present suit is *barred* because not filed under the act of 1891 within three years, when he *did,* within three years, file his suit with the court below under that act, which the court refused to entertain for want of jurisdiction. The judgment of the court below dismissing the petition for want of jurisdiction was on the 13th day of June, 1898, long after the bar of three-year limitation under the act of 1891 had fallen. At the time the three-year limitation attached to the claim, it was *pending* in the court below undisposed of. Had claimant at any time thereafter, until January 11, 1915, filed his petition in the Court of Claims, it would have been subject of motion for dismissal for want of jurisdiction.

If the court below was given *jurisdiction* of the case by the act of 1915 (and this jurisdiction cannot be escaped unless by judicial legislation the word "band" is put back in the act) then we respectfully submit that the only limitation against the time of filing suit is either the three years under the act of 1891, extended by the amendatory act to three years after January 11, 1915, or the six-year limitation generally applicable to suits under the general jurisdiction of the Court of Claims.

The court below *did* assume this jurisdiction in non-amity band cases that were *pending* at the time of the enact-

ment of the amendment of 1915, admitting the force and legal effect of the amendment as it related to the court's jurisdiction of non-amity band cases.

If this court may take judicial notice of what has transpired in the court below we may cite the following unreported cases wherein this new jurisdiction was exercised:

In Wynn, Ind. Dep. No. 9047 (unreported) the depredation was committed by Indians of Black Hawk's band, within the period of the disturbances in which this depredation occurred. There it was urged that the word "band" had been inadvertently omitted from the act of 1915, and the court below very properly stated, if so, that Congress would have to put it back into the law; that the court could not. The same defenses were made in that case as in this, except the statute of limitations. The Wynn case was a non-citizenship case that had been reinstated under the act of 1915, and the court assumed jurisdiction and awarded judgment.

A more striking case is that of Johnson, No. 2672 (unreported). Johnson was a neighbor of the plaintiff in error, *and suffered his loss on the same day and at the hands of the same Indians (Black Hawk's band) that Ivie, plaintiff in error, did.*

Johnson was not a citizen at the time of his loss, and his case was dismissed upon the jurisdictional ground of his non-citizenship (120 U. S. 546). His case was reinstated under the act of 1915, *and, as the want of amity of a band of Indians was no longer a jurisdictional bar, as decided in the Wynn case, a judgment was awarded to Johnson, and has been paid by appropriation of Congress.*

The above presents this anomalous situation, as to this feature of the law as amended by the act of 1915, and as it is construed by the Court of Claims:

These two claimants, neighbors, lost property on the

same day and by depredations of the same band of Indians, Johnson's case had been dismissed for want of jurisdiction under the act of 1891, because of his non-citizenship. The court below, under the amendatory act of 1915, took jurisdiction of the case which it could not have had without holding the act as conferring *jurisdiction* in non-amity band cases, for Black Hawk's band was admittedly hostile, and awarded Johnson a judgment.

Ivie'e case had been dismissed because of the non-amity of Black Hawk's band. He is not within the act providing for *the reinstatement of non-citizenship cases*, although, we submit, under a liberal construction of the amendatory act, and with the broad powers inherent to the Court of Claims as to matters of procedure, once jurisdiction of the case was given by act of Congress, it might have ordered reinstatement of the case and proceeded to trial upon the merits. He is denied relief, and the right to have his "day in court," and his petition is dismissed upon a theory *that it is barred under an act of Congress that did not give jurisdiction to the court below to hear his case upon the merits!*

It cannot be thought that the Congress intended legislation that would lead to such an unjust conclusion as was reached by the court below in the instant case.

The court assumed jurisdiction under the act of 1915 of a non-amity band case and awarded judgment, if;

(a) The claim was pending at the time the act of 1915 was passed. (Sharp, No. 8702-3, unreported.)

(b) The claimant was not a citizen of the United States when he suffered his loss, and if his petition had been dismissed upon this jurisdictional ground. (Wynn, No. 9047, unreported.)

(c) The Court refuses to award judgment, although the claimant was a citizen when he suffered his loss. If his petition was dismissed upon the jurisdictional ground that

the *band* was not in amity with the United States, although the court in the above-cited cases admits its jurisdiction of hostile band cases under the act of 1915.

Further, when we look to the act of 1915 for a limitation against suits, we find by the last proviso this limitation:

> "That nothing in this act shall be construed to authorize the presentation of any other claims than those upon which suit has heretofore been brought in the Court of Claims."

It is shown by the petition, the fact being admitted by the demurrer, that a claim for this loss *was filed* in the Court of Claims, which action by claimant excluded the case from the limitation of the proviso and places it within the class of cases to which relief is extended, and of which jurisdiction was given.

JURISDICTION AND THE PROVISO

We have shown that in three unreported cases the court below has construed the amendment of January 11, 1915, as conferring *jurisdiction* in non-amity band cases, which jurisdiction it did not have under the act of 1891.

It is in answer to the discussion of these two questions by the court in its opinion—rather in its decision—that we address ourselves to them.

On page 7, R., the court says:

> If the act of January 11, 1915, was intended to enlarge our jurisdiction and revive numerous cases dismissed because of the proven hostility of a band of Indians committing the depredation, it would not have so pre-eminently treated the one of citizenship alone.

The act enlarged the court's jurisdiction, as it construed the act, in all non-amity band cases that were upon the

dockets of the court undisposed of, as it proceeded to exercise this jurisdiction and award judgment.

The act enlarged the court's jurisdiction, as it construed the act, in all non-citizenship cases and proceeded to exercise this jurisdiction and award judgment irrespective of the non-amity of the band.

This action of the court could have proceeded upon no other theory than that the act of 1891, as amended by the act of 1915, enlarged the court's jurisdiction so that it included non-amity band cases, if such cases had been filed in the court, and the tribe to which the band belonged was in amity with the United States.

> An act of Congress will not be construed as giving a right and taking it away at one and the same time. * * * McLain vs. U. S. 223 U. S. 374.
>
> Where a statute is remedial it must be so applied as to accomplish its purpose and effectuate the statute. * * * Said act being remedial must not be so applied as to defeat its purpose. (Citing McLain case.) Jackson v. U. S. 50 C. Cls. 392.

We think the case of Snare and Triest Company v. The United States (50 C. Cls. p. 201) is peculiarly applicable to the instant case.

There suit was brought under a special jurisdictional act which restricted the recovery in the event of liability to "damage to barge and machinery," etc. Under this act a recovery was had but limited to the scope of these restrictions.

Subsequently, Congress passed another special jurisdictional act which intended to cover the *omissions* of the first one. In construing this second act the Court said:

> * * * Legislation of this character is not unusual in cases sent to this court by special jurisdictional acts.

Not infrequently such acts are materially enlarged in scope of authority originally granted by subsequent legislation upon the same subject matter. No sound reasoning can be advanced for withholding jurisdiction in this case, in view of the language used, and especially so where it is clear that the Congress not only intended to correct a previous omission, but employed terms sufficiently comprehensive to cover the whole controversy.

* * * Courts are constrained to give effect to jurisdictional statutes where the intent of the legislature can reasonably be inferred from the language thereof to vest authority to judicially ascertain the merits of the controversy. (Supervisors v. Stanley 105 U. S. 305.) Doubts are to be resolved in favor of jurisdiction unless some established law is violated. (Endlich on Statutory Construction, Sec. 430.)

Butler & Vale v. U. S. 43 C. Cls. 518.

Mille Lac Indians v. U. S. 46 C. Cls. 476.

A statute designated to give a class of claimants legal remedy for the enforcement of their claims where none exists available to them is a remedial statute to be construed so as to enforce the remedy.

Neurath v. U. S. 17 C. Cls. 225.

A remedial statute must be construed liberally so as to afford all the relief within the power of the court which the language of the act indicates that the legislature intended to grant. *Courts will look into the occasion for the passage of such an act, and will consider the evils or wrongs which it seeks to remedy, their nature and extent, in order to determine how far it was intended the act should reach, whether to cases thereafter to arise, or to existing cases entirely passed and consummated.* (Italics are mine.) Johnson v. U. S. 17 C. Cls. 171.

Referring to the Snare and Triest case it will be noted that the Court of Claims recognized the frequency of amendments to special jurisdictional acts intended to supply omissions, or so as to provide remedy by enlarged juris-

diction, for failures found in prior legislation upon the same subject.

Following Johnson's case, *supra,* if we look to the history of previous legislation upon the subject of Indian Depredations, and note wherein the act of 1891 failed of the promises in the two classes of cases subject of the amendment of 1915, we readily find "the evils and wrongs which it seeks to remedy."

Likewise, applying the doctrine announced in Neurath's case to the act of 1915, we find a class of claimants to whom promises of ultimate indemnity had been repeatedly made by the Government, but who were not embraced in the fulfillment of the promise—the act of 1891—who had no "legal remedy for the enforcement of their claims" and none "was available to them" until the act of 1915. In such cases the court said that the statute was remedial and should "be construed so as to enforce the remedy."

Certainly the proviso as to the *reinstatement* of *non-citizenship* cases cannot be taken as a measure of the court's jurisdiction and *power* under the act of 1891 as amended by the act of 1915. We submit that this proviso relating to only one of the two classes of cases enumerated in the act, has application *to only those cases belonging to the class mentioned.* The proviso was wholly unnecessary as the Court of Claims could have proceeded under its general powers, and under the act of 1891, to *administer* its new jurisdiction without any directions whatever as to the matters of the court's procedure in such administration.

We submit that once *jurisdiction* was conferred it was the duty of the court to administer same. It could have ordered procedure in the cases within the new jurisdiction by requiring a new petition to be filed, and ordering a consolidation of the case formerly filed with the new case. Or the court might have, by a rule, ordered reinstatement

of cases which had been filed under the act of March 3, 1891, and dismissed for want of *jurisdiction,* and of which it had been given jurisdiction by the amendatory act of 1915. If the court had lost *power* over its judgment of dismissal for want of jurisdiction after lapse of term (which is by no means clear) there can be no question that, with the investment of a new *jurisdiction,* it became invested with power to exercise such jurisdiction.

We submit that no serious difficulties were in the way of exercising this new jurisdiction, and with due respect to the court below, we further submit it should have proceeded under the act of 1915 to the consideration of the non-citizenship and non-amity band cases that had been filed in the court and dismissed. The court had inherent power to administer the law once jurisdiction was given. It had been many times held that by reason of the peculiar jurisdiction of the Court of Claims that it is not held to the laws of pleading or to many of the refinements of the law usually applicable to other courts. In other words, it is a court of very broad powers, and should seek to enforce the will of Congress when expressed in the Statute, unless there is some clear statutory prohibition.

That the court below *has* taken the act of 1915 as enlarging its jurisdiction in non-citizenship cases will not be denied. Those cases which were pending in the court undisposed of were proceeded with under the new jurisdiction; those that had been dismissed because the claimant was not a citizen were reinstated and proceeded with upon their merits to final judgment. Likewise the court has taken the act as enlarging its jurisdiction in the non-amity band cases, and this cannot be denied.

Sharp, No. 8702-3 (not reported), was against the Sioux Indians, but the depredation was committed by a *hostile band* of the Sioux. The tribe was in amity, the band had

been held by the court as hostile, and the court had no jurisdiction under the act of 1891, and jurisdiction only under the act of 1915. The court accepted and assumed this jurisdiction and awarded judgment. The case was pending in court when the act of 1915 was passed.

Wynn, 9047 (not reported), as before stated, was a Black Hawk band case, as was Johnson's case No. 2672. These claimants were not citizens of the United States when their depredations were committed and their petitions had been dismissed by the court on that jurisdictional ground. The cases were reinstated under the act of 1915 and judgments awarded. *Unless that act had amended the law so as to relieve the cases of the requirement of the amity of the band, the court was still without jurisdiction.*

The direct defense was made in the Wynn case that the act of 1915 did not relieve the case of the requirement of the amity of the band as a condition to the court's jurisdiction, but the court declined to so hold and awarded Wynn a judgment. Following this holding, Johnson's case, where the depredating Indians were Black Hawk's band, went to judgment and these judgments have been paid by appropriation of Congress.

Ivie, the plaintiff in error, the neighbor of Johnson, then a citizen who lost property on the same day and by depredation of the same Indians, is denied judgment, not under the theory that the court did not have jurisdiction, but upon the theory that the claim is barred by the three-year limiation in the act of 1891!

If this court takes judicial notice of these unreported cases, we are sure defendants in error and will not question the statement of the cases as here made, and judgments as rendered therein. We again submit that the only question in the case is that of the *jurisdiction* of the court below. If jurisdiction was given, then the statute of limi-

tation of three years in the act of 1891, could not operate against the claim, because no right of action upon the claim was given by that act, nor was jurisdiction of the case given, and a forum provided within which the claim could be presented and prosecuted, until the act of 1915. The petition, under that act, *was filed within three years.*

In construing this act of January 11, 1915, and the proviso discussed by the court below in the opinion, it might well be held that Congress did not intend that the proviso should be used in its technical sense. The words "provided further" might be stricken from the act entirely, or stricken from the act and the word "and" substituted, and there would be perfect harmony between the enactment clause and the proviso. It is more an exception of a class of cases within the act, and direction to the court as to procedure in this class of cases, than it is a proviso in its technical sense.

In Carroll vs. The State, 50 Ala. 396, cited with approval by Richardson, Ch. J., *27.* C. Cls. 144, it was held:

> "Because the term 'provided' is used in the law, it does not necessarily follow that the matter which may succeed is a proviso in its technical sense; it is a matter of the succeeding words, and not the form, which determines whether it is or is not a technical proviso."

In Royce 36 C. Cls. 335, Judge Peelle said:

> "The general rule of law, says Mr. Story in the case of U. S. vs. Dickson (15 Peters, 146, 176) which has always prevailed and become consecrated almost as a maxim in the interpretation of statutes, is, that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that the proviso is construed strictly and takes no case out of the enacting clause which does not fall fairly within its terms."

In 36 Cyc. p. 1162 (footnote 55) it is stated "only those cases that are fairly within the terms of a proviso are taken out of the operations of a statute by it."

It may be safely stated, as a rule of statutory construction, that the enactment clause and the proviso should be taken together with the view of giving effect to each, and to carry out the intention of the legislature as manifested in the entire act. (1 Kent. 463.)

If the proviso be found repugnant to the enactment clause, it, the proviso, must be held void. (36 Cyc. 1163.)

To sustain defendant's contention, we would have to distort this general rule as given by Mr. Story, and which has "become consecrated almost as a maxim in the interpretation of statutes" into a rule that where the enactment clause is general in its language, the proviso is to be construed so as to take everything out of the enactment clause that does not fall clearly within the proviso.

In Skelly v. U. S. (32 C. Cls. 229) where the defendants were seeking to interpose a technical defense of the statute of limitations, Nott, Ch. J., said:

> * * * A third reason is that in this court it is not a question of costs or technical defense. On the contrary the Government desires that all cases shall if possible be determined upon their merits. Such is the theory by virtue of which the court exists—that where the citizen has a good and meritorious cause of action and brings his suit in time he shall succeed.

That claimant Ivie had a "good and meritorious cause of action" and that he availed himself of every invitation of the Government to present his claim, cannot be denied. He filed his claim first in the Interior Department. Next, and promptly in the Court of Claims under the act of 1891. The court said it did not have jurisdiction of the case

under that act and dismissed his petition. There was no jurisdiction thereafter, until the act of 1915, within which he could file his petition. His petition, subject of defendant's demurrer, herein, was promptly filed under that act. The court, not denying its jurisdiction, now says that the claim is barred, a technical defense, not within Chief Justice Nott's theory of the reason for the court's existence.

In Lippett vs. U. S. 100 U. S. 667, Mr. Justice Harlan, said referring to the injustice of the application of the statute of limitation as a technical defense to a meritorious claim:

> * * * We are unable to concur in this construction of the statute of March 3, 1863. Such a construction would work an injustice which we cannot suppose Congress intended should be done to a citizen having a demand against the Government. * * * It should not be sustained unless we are required to do so by some absolute, unbending rule of construction.

As has been suggested, the Court of Claims was never intended by Congress to be a court hedged about by technicalities and such refinements that would make it difficult for the humble citizen to approach the court and have his claim against his sovereign adjusted. Once it becomes such a court, as was stated by Ch. J. Nott, "the theory by virtue of which the court exists," is entirely and absolutely overturned and the real usefulness of the court, as a forum in which to adjust his differences with his Government, is largely lost to the citizen.

HARRY PEYTON,
Attorney for Plaintiff in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1919

MARY E. REX, ADMINISTRATRIX, JAMES A. IVIE, DECEASED, *Appellant*,

vs.

THE UNITED STATES AND THE UTE INDIANS, *Appellees*.

No. 126.

APPELLANT'S REPLY BRIEF

Jurisdiction

Learned counsel for appellees contends (p. 7 his brief) that the question involved is that of the *jurisdiction* of the Court of Claims under the act of 1891, as amended by the act of 1915.

The Court of Claims, under its decision, p. 8 R. (53 C. Cls., 331), sustained defendants' demurrer and dismissed the petition upon the theory that the claim was *barred* under the three year limitation in the act of 1891.

This theory seems to have been abandoned by counsel for appellee and the defense is here grounded upon the want of *jurisdiction* in the lower court to entertain the petition filed under the amended statute of 1915.

When we consider the amendatory act of 1915 along with the original jurisdictional act of 1891, unless we take the proviso relating to the *reinstatement* of non-citizenship cases as controlling the express language of the enacting clause, it is not difficult to arrive at the intention of Congress.

> As a rule of construction, an amended statute is understood in the same sense exactly as if it had read from the beginning as it does amended.
> Blair vs. Chicago, 201 U. S. 475.

Reading the statute as amended it is as follows:

> That in addition to the jurisdiction which now is, *or may hereafter be*, conferred upon the Court of Claims, said court shall have and possess jurisdiction and authority to inquire into and adjudicate, * * * all claims for property of citizens or *inhabitants* * * * taken or destroyed by Indians belonging to any *tribe* in amity with the United States. * * * (Italics mine.)

The only express *limitation* upon this enlarged jurisdiction is that found in the third proviso, excepting from the provisions of the act, all cases which had not been filed in the Court of Claims under the act of 1891. *This claim had been filed under that act.*

The meaning of this proviso is easily understood when we look to other statutes upon the same subject, particularly that of March 3, 1891.

Therein, by a proviso as to limitations against the consideration of *stale claims*, unless a claim had been filed and was pending before the Secretary of the Interior, etc., with evidence supporting it, prior to July 1, 1865, it was barred.

This third proviso in the amendatory act of 1915 was unquestionably intended to prevent the filing of *new* suits.

Congress doubtless thought that a claimant who had never availed himself of the remedies theretofore provided, viz.: to file his claim with the Secretary of the Interior, etc., and to file his claim in the Court of Claims under the act of 1891, should be barred of the relief given in the act as amended.

The claim at bar was not a stale claim. Appellant had filed his claim, with abundant proof of his loss, with the Secretary of the Interior prior to the enactment of the statute of 1891.

Almost immediately the act of 1891 was passed, he filed his claim, in the Court of Claims, brought the files from the Indian Office, by motion provided in the statute, with his evidence, to the Court of Claims. Proceeded with diligence to take his depositions under the rules of the court, and prepared his case for trial.

Upon a hearing, it appearing that the depredation had been committed by Indians belonging to a *band* not at amity with the United States, the petition was dismissed *for want of jurisdiction.*

Had the statute then read as it now does this defense would not have been entertained and claimant would have had his trial upon the merits of his case.

There is no ambiguity in the language used by Congress in the enacting clause of the act of 1915. When the act of 1891 is read, as thus amended, the purpose of the act is clear, that is, to extend the *jurisdiction* of the Court of Claims to the claims of *"inhabitants"* as well as citizens; and to remove the jurisdictional requirement of amity except that of the *"tribe,"* in both respects the statute being in harmony, *literally,* with prior statutes upon the same subject, and fulfilling promises repeatedly made. Unless interrupted by the judicial interpretation invoked by appellees, the amended statute will fulfill these promises and accomplish this purpose.

If there was only one subject involved under the amendatory act of 1915, i. e., the claims of inhabitants, and if there were no statutes *in pari materia;* no historical data relating to legislation generally touching claims for Indian depredations; in other words, if there was nothing before the court but the two statutes, it might be contended that the omission of the word "band" from the act of 1915 was a mere inadvertance of Congress.

However, we submit that the court cannot legislate the word band back into the act and thus amend the act of 1915.

> The interpolation of words is allowable only where necessary to prevent the act from being absurd. * * * Barron vs. Kaufman, 131 Ky. 642.

Not only was the act of 1891 amended by striking out the word "band," but following the declaration of this court in Montoya vs. U. S., 180 U. S. 261, that "the word nation as applied to uncivilized Indians is so much of a misnomer as to be little more than a compliment," this word was stricken from the act.

The provision as to "inhabitant" was qualified so that the court's jurisdiction should not extend to Indians then or thereafter in tribal relations.

As shown, that stale claims might not be filed, in harmony with the limitation in the act of 1891, the relief was limited to claims which had been filed in the Court of Claims under the act of 1891.

When we look beyond the two statutes under consideration, that of 1891, and the amendatory act of 1915, we find many statutes upon the subjects involved, and it is worthy of note that the amendment of 1915 makes the act of 1891 conform literally to the previous statutes upon the same subject.

This statute of 1891, and its failure to provide for the payment of what were known as "band" and "inhabitant" cases, was repeatedly before Congress by bills to amend the law; extended hearings before committees were had and numerous reports were made, etc.

In a report made to the Committee on Indian Affairs of the House, Representative Stephens, of Texas, and Smith, of Arizona, stated:

> A further amendment proposed by the pending bill relates to the "band," "tribe" or "nation" of Indians. In all the earlier acts, beginning with that of 1796, the language used in describing the Indian depredators is "Indians belonging to any 'tribe,'" etc. That language is continued in the later acts of 1799, 1802, 1834 and Revised Statutes, section 2156, * * * but the word "band" nowhere occurs.
>
> The true intent of the act of 1891 was to make the tribe or nation responsible, and not fragments of such a tribe or nation who may have made a murderous raid. The amity to be inquired into under the act was the amity of the tribe, as a tribe, having treaty making power. * * *

In hearings before the same committee, March 21, 1904, February 27, 1908, and as late as February 14, 1914, the use of the word "band" in the act of 1891, and the effect given the word by the courts, was discussed and the repeal of the amity requirement of the act was then under consideration.

In the committee report on H. R. 22, reference is made to the fact that not until the act of 1891 had the requirement of the amity of a "band" been found in any of the Statutes. (Rep. 311, 63d Cong., 2d Sess., p. 7.)

Upon appellant's original brief reference is made to the conference reports upon which the act of 1891 was passed, it appearing from these reports that the word "band" was

not therein used. Reference was also made to a statement of Representative Hermann, one of the conferees, that the word "band" was not in the bill as agreed upon by the conferees. (P. 6 of original brief.)

We respectfully submit, that, not only the prior statutes upon the same subject may be looked at, to arrive at what Congress had in mind when the legislation was enacted, but the court will take judicial notice of the decisions of the courts bearing upon the subject, and the history of the legislation relating to the same.

While the correctness of the application of the general rule of construction of statutes as applied to the cases cited and relied upon by appellees, p. 7 his brief, is conceded, we submit the rule does not have application to the case at bar. In the cases cited it was attempted, by implication, to *extend* the jurisdiction of the court. In the instant case it is attempted, by *implication*, to *destroy* or *restrict* a jurisdiction conferred by the plain words of a statute.

The Proviso.

This brings us to a discussion of what we deem the real and only question in the case, viz: Is the jurisdiction conferred by the enacting clause of the act of 1915 destroyed by the second proviso which relates to the reinstatement of non-citizenship cases?

As to what extent the enactment clause may be qualified or limited by the introduction of a proviso into the act is very well settled by the case of U. S. *vs.* Dickson, 15 Peters 165, cited p. 19 original brief.

It is first contended for appellees that the sole purpose of the legislation, the act of 1915, is disclosed by the proviso relating to the reinstatement of non-citizenship cases. Subsequently it is suggested that *possibly* jurisdiction *may* have been conferred upon such band cases as had been filed in the Court of Claims and were *pending* at the time of the passage of the act.

It is further contended that under Sec. 7 of the act of 1891 the judgment of the Court of Claims dismissing the petition *for want of jurisdiction* was a final judgment, and there was no power in the Court of Claims, under the act of 1915, to reinstate the case.

The "determination" contemplated by this section of the act of 1891 was that "of the rights and obligations of the parties," and we submit that the decision of the court that it had not jurisdiction decided only that single question. Congress, being advised of the decisions of the court, amends the law and supplies the *jurisdiction* by direct amendment of the statute under which the court held it had not jurisdiction.

In passing, it might be stated that the jurisdiction and powers of the Court of Claims is unlike that of other courts. It is essentially a court wherein the rights of the citizen against the sovereign are adjudicated. Adding to its general jurisdiction, Congress is continually giving it special jurisdiction of individual and *class cases.* It has often declared itself a court of broad powers, and has so been held by this court:

> * * * In this court it is not a question of costs or technical defense. On the contrary the Government desires that all cases shall if possible be determined upon its merits. Such is the theory by virtue of which the court exists—that where the citizen has a good and meritorious cause of action, and brings his suit in time, he shall succeed.
>
> Skelly vs. U. S., 32 C. Cls. 229.

> * * * we must remember that the Court of Claims is not a mere common law court, and is not restrained by narrow rules of technical pleading. It is a court of limited jurisdiction, *but of broad powers within the scope of its jurisdiction,* created to enable honest claimants to reach the treasury; and it is not

allowed to interpose purely technical barriers between them and the payment of just claims. (Italics mine.)

Thomas vs. U. S., 15 C. Cls. 342.
Dis. of Col. vs. Barnes, 197 U. S. 146.

The legislation under consideration dealt with a *class* of cases which had for many years been subject of legislation, viz.: claims of persons who had lost property by depredations of Indians belonging to a *tribe* in amity with the United States.

When it came to the administration and interpretation of the remedial statute—the Act of March 3, 1891—it was found that two classes of cases, within all prior acts upon the same subject—the acts of liability of the Indians—had not been provided for in the *jurisdictional* clause of the act. Numerous decisions of the Court of Claims and of this court were rendered upon these two features of the act of 1891.

As an aid in the construction of the act of 1915 it is important to note that the *jurisdiction* wanting in the two classes of cases omitted in the act of 1891 are therein supplied, the language used being plain and unambiguous. It is further important to note that the act of 1891 is purely *jurisdictional*. The *liability* of the Indians had continued through all the years since 1796.

The act of 1891 does not create a claim for the adjudication of the court, nor does it create any new liability against the Indians, but therein the United States assume existing liabilities.

Leighton vs. U. S., 29 C. Cls. 320.
Love vs. U. S., 29, C. Cls. 324.

Practically all of the cases of the two classes had been dismissed for want of jurisdiction in the act of 1891, before the passage of the act of 1915.

Appellees contend that although Congress legislated directly upon the jurisdictional defect of the act of 1891, conferring jurisdiction by the amendatory act of 1915, of two classes of cases, of which the court had not been given jurisdiction by the first named act, it intended (the intent is shown only by implication) the relief to apply to *aliens* only.

We contend that once *jurisdiction* was given, "the broad powers within the scope" of this jurisdiction, possessed by the Court of Claims, gave it ample authority to administer the relief.

While it is very well settled that courts generally lose power over their judgments after expiration of the term within which the judgments are rendered, we are not so sure that it applies to the Court of Claims in all cases. The rule rests upon the theory that, after lapse of term, the court has lost jurisdiction of the parties and the subject matter of the suit. The case is "at large" as it were.

In none of the cases examined, among them Wetmore vs. Karrick, 205 U. S. 153, have we found the exact question here presented, i. e., where a *class of cases* are sent by act of Congress to the Court of Claims, and it is found that a class within the general class is not within the jurisdiction of the court, and Congress subsequently supplies the jurisdiction of the cases which have been filed in the Court of Claims and dismissed *for want of jurisdiction*, if the general rule first stated applies.

Differentiation may be made in that the cases sent to the Court of Claims under special act of Congress,—no other court having jurisdiction of them—and dismissed because of want of jurisdiction, are not "at large" in the sense used by Mr. Justice Day, because they are subject of only such jurisdiction as Congress may especially create. This theory in the Miller case proceeds from the fact that the case

is "at large" and "the party is at liberty to bring his suit elsewhere in any court of competent jurisdiction."

So. Ry. vs. Miller, 217 U. S. 217.

This claimant was at liberty to bring his suit in the Court of Claims only by a special act of Congress, "special" in the sense that the act related to claims of a particular class. He assumed he had the right under the act of 1891, and filed his petition. The court found it had not jurisdiction. Unless he has the right to have his case heard under the amended act, either by reinstatement, upon a new suit, or consolidating the two, he is still without a forum authorized to hear and determine his case. It cannot, therefore, be said that the case is "at large" and that he is at liberty to bring his suit in some court of competent jurisdiction.

We think the reasoning of Mr. Justice Nott, in the Book case, insofar as this rule is to be applied to cases of this character which have been sent to the Court of Claims by act of Congress, is sound, because it is reasonable and just. He said:

> * * * The question, however, remains whether the court had jurisdiction to open the default in the case after the expiration of the term. The point has never been absolutely decided, but the opinion has been many times expressed that a court does not lose jurisdiction with the expiration of the term unless the judgment rendered was in the true sense of the term a final judgment. * * * *In this court* no costs are recovered, the Government in such cases gains nothing by retaining the default and compelling a claimant to bring a second action, unless it be the interposition of the statute of limitations, and *that is not a defense which should be favored, where a party has in fact brought his suit in time.* (Italics mine.)

Book vs. U. S., 31 C. Cls. 274.

The court will note that the petition herein, pp. 1-3 R., sets out the filing of the petition, 702, in the Court of Claims, under the act of 1891. It prays that the former suit be consolidated with the case last filed; that a hearing of the cases, thus consolidated, upon the evidence taken and filed, be had, and judgment be awarded thereon. And, further, "that all pleadings and proceedings had by this court in said case No. 702, insofar as the same are necessary in the instant case, in its determination under the said act of January 11, 1915, be made parts hereof."

Under the amended act, and upon this petition, we respectfully submit that the court should have proceeded to adjudicate the case upon its merits. It had assumed jurisdiction of non-amity band cases under the act of 1915, and could not, with consistency, hold that, as to such cases, it had not *jurisdiction* under the act.

The only theory left, upon which the court below could base a decision adverse to the claimant was that of the three year bar in the act of 1891, which theory is practically abandoned by the learned counsel for appellees.

Construction of the Statute

The act of March 3, 1891, was a purely jurisdictional statute.

Love vs. U. S., 29 C. Cls. 332.

When we look to the "mischiefs intended to be remedied," by an amendment of this act, we find that for nearly a century the Government had promised the citizen and *inhabitant* that it would indemnify him for the value of his property taken and destroyed by Indians belonging to a *tribe* in amity with the United States. One of the conditions to this promise was that he must not "seek private satisfaction or revenge" of the depredating Indians.

The reason for this condition was that attempts at recovery would bring about friction with the tribes, and the claimant was remitted to this promised relief.

When it came to the fulfillment of this promise, in two particulars the promise failed. Relief was withheld from the "inhabitant," and the citizen was denied relief if the depredating Indians belonged to a "band" that was hostile —not in amity—although the tribe to which the band belonged was in amity.

Claims were filed with the Secretary of the Interior for depredations upon the property of citizens and inhabitants by Indians of bands who were not in amity, where the tribe to which they belonged was in amity. There was no inhibition against the filing of these claims, as, up to the passage of the act of 1891, the word "band" was in none of the acts. Only the amity of the tribe was a condition of ultimate liability.

When it came to the proof it was found that many claimants were not citizens of the United States, or could not establish their citizenship by proof. Some had served in the United States army and thought their honorable discharge met the requirement. Others, foreign born, thought they had become citizens by collective naturalization. Still others, who had come to the United States in their minority, thought evidence that their father had exercised all the rights of citizenship would suffice. These, and many other questions affecting the citizenship feature of the act, arose, and were matters of judicial determination, as will appear from the reports of this court and of the Court of Claims.

Possibly it was because of the very many questions that had been involved in the construction of the act regarding "citizenship," Congress expressly provided that alienage

should not be a defense in these cases, and those which had been filed and dismissed might be reinstated.

Some claims had been filed against *tribes* of Indians, and when it came to the proof it was disclosed that the depredating Indians were of a "band" not in amity with the United States, though the tribe to which they belonged were in amity. If the band was hostile (sometimes a "band" would be composed of not more than twenty Indians of a tribe numbering some thousands) the petition was dismissed for want of jurisdiction.

Montoya vs. U. S., 180 U. S. 261.

As only one general question was involved in the band feature of the act (the amity of the *tribe* having been retained), possibly Congress thought these cases might be proceeded with under the ample provisions of the act of 1891, as amended, or in such manner as the Court of Claims, under its broad powers, might direct.

When we look to the law relating to *liability* (Act 1834, 4 Stat. L. p. 731, sec. 17), we find that this claim is within the law. When we look to the statute for a forum within which the claim might have been adjudicated we find a *want of jurisdiction.* (Act March 3, 1891.)

In a most elaborate and learned discussion of the scope and purpose of the act of 1891, Mr. Justice Peelle, said:

> That we may be aided in our endeavor to ascertain the intention of Congress, as expressed in the Act of March 3, 1891, concerning the court's jurisdiction thereunder, we will consider briefly the policy of the United States in dealing with Indians, both by treaty and by legislation, on the subject of the taking and destruction of property by Indians, and to do so we will consider,
>
> (1) "What was the law before the act was passed: (2) what was the mischief or defect for which the law had not provided; (3) what remedy the legisla-

ture had appointed, and (4) the reason of the remedy. (Sec. 27, Endlich Int. of Stats.)"

Leighton vs. U. S., 29 C. Cls. 299.

In Leighton's case, *id.*, a question arose as to the court's jurisdiction as to two classes of cases enumerated in the act of 1891; whether a preferential status given a subsequent class operated to limit the status of a prior class. The general principle involved is very analagous to that here presented. Upon this question it was said, *id*, pp. 311-312:

> * * * Unless the act clearly expresses a different rule for the guidance of the court, it must be so construed as to apply to all citizens alike, who at the time the act was passed had claims which arose from the destruction of property by Indians "belonging to any band, tribe, or nation in amity with the United States. * * *"
>
> The first subdivision being broad and including "all claims for property of citizens of the United States taken or destroyed by Indians" irrespective of the treaty relations of such Indians, does the second subdivision limit the first subdivision to such claims of citizens as accrued to against Indians not under treaty relations?" * * * Congress must have known when the act was passed that there were very few Indians not under treaty relations, etc. * * *
>
> We see no force in the argument that the language in either case showed an intention on the part of Congress to confer on the court separate jurisdictions to inquire into and finally adjudicate claims *conceded to have the same common origin,* though separated into different classes. Every claim cognizable under the act *arose from the taking or destruction of property by Indians.* * * * (Italics mine.)

In the Love case, *supra* (p. 340), concerning the word

"amity" and the interpretation that should be given it, referring to the use of the words in the prior statutes, the court said:

> When a word has thus been employed through a century in numerous acts of Congress, and with reference to the same subject matter—our international relations with the Indian tribes—it is manifest that it must be taken and used in the last statute in the same sense that it was employed in the first. The judiciary cannot ascribe a new meaning to it at any point in the series; what it meant at first it means always and now. * * *

As the court in these cases looked to the former statutes to determine the meaning of the words "amity of the tribe" that the intent of Congress might be disclosed in the act of 1891, so may we look to the same statutes to discover the general purposes of the legislation upon the subject down to the last expression of the Congress.

The language used in the act of 1915, conferring *jurisdiction* on the Court of Claims, with power to adjudicate, *all* claims for property of citizens and *inhabitants,* taken or destroyed by Indians belonging to a *tribe* in amity with the United States, is unambiguous.

It cannot be imputed to Congress that it would unintentionally make so material a change in a statute as is made by the amendment. Neither should the fact be overlooked that the amended statute so changes the law, that it now is, as amended, in the *exact words* of the original statute of liability, and the many statutes that succeeded it.

We again submit that the jurisdiction conferred by the act, with authority to adjudicate, invested the Court of Claims with full power to hear and determine the case upon its merits.

He who would restrict the power thus given us to determine and adjudge must show the restriction *totidem verbis* it can never be shown by construction.

Roberts vs. U. S., 6 C. Cls. 89.

The general rule undoubtedly is, that whenever a power or jurisdiction is conferred by statute, everything necessary to make it effectual or requisite to attend the end is implied.

Ex parte Merelett, 71 Ala. 373.
Potters Dwarris on Stat. 123.

If these contentions be sustained, the only question left would be that of the statute of limitations, a defense meeting with little favor, and particularly so, as held by Mr. Justice Nott in the Book case, *supra*, "where the party has brought his suit in time," and one that should not be sustained, as stated by Mr. Justice Harlan in Lippett, *supra*, "unless we are required to do so by some absolute, unbending rule of construction."

If the intention is to deal liberally with the grantee, the terms of the statute should be liberally construed. Especially where it appears that the grant flows, not from the solicitation of the grantee, but from the Government's own motion.

13 Calif. 444.

Where statutes are *in pari materia*, in the construction of a particular statute, or the interpretation of its provisions, all acts relating to the same subject, or having the same general purpose should be read in connection with it, as together constituting one law. The endeavor should be made, by tracing the history of the legislation, upon the same subject, to ascertain the uniform, consistent purpose of the legislation.
* * *

Smyth vs. Fiske, 13 Wall. 380.

We should discard any construction that would lead to absurd consequences.

> We ought rather, adopting the language of Lord Hale, to be "curious and subtle to invent reasons and means" to carry out the clear intent of the lawmaking power thus expressed.
>
> Oats vs. National Bank, 100 U. S. 244.

In conclusion we respectfully submit that the Court of Claims was invested with jurisdiction of the case at bar by the amendatory act of 1915, and had authority to hear and determine the same, and to render judgment upon the merits of the claim.

That the claim was not barred under the three year limitation of the act of 1891, and it was error to so hold. As there is no limitation fixed in the amended act of 1915, we submit that the six year limitation prescribed in the statute should govern. (Sec. 156 Judicial Code.)

This claim was filed within the three years after the passage of the act of 1915.

HARRY PEYTON,
Attorney for Appellants.

APPENDIX

GENERAL LEGISLATION ON CLAIMS FOR DEPREDATIONS COMMITTED BY INDIANS

Act of May 19, 1796, section 14 (1 Stat. L., 472)

And be it further enacted, That if any Indian or Indians, belonging to any tribe in amity with the United States, shall come over or across the said boundary line into any State or Territory inhabited by citizens of the United States, and there take, steal or destroy any horse, horses, or other property belonging to any citizen or inhabitant of the United States, or of either of the territorial districts of the United States, or shall commit any murder, violence, or outrage upon any such citizen or inhabitant, it shall be the duty of such citizen or inhabitant, his representative, attorney, or agent to make application to the superintendent, or such other persons as the President of the United States shall authorize for that purpose, who, upon being furnished with the necessary document and proofs, shall, under the direction or instruction of the President of the United States, make application to the nation or tribe to which such Indian or Indians shall belong for satisfaction, and if such nation or tribe shall neglect or refuse to make satisfaction in a reasonable time, not exceeding eighteen months, then it shall be the duty of such superintendent, or other persons authorized, as aforesaid, to make return of his doings to the President of the United States, and forward to him all the documents and proofs in the case, that such further steps may be taken as shall be proper to obtain satisfaction for the injury. And, in the meantime, in respect to the property so taken, stolen, or destroyed, the United States guarantee to the party injured an eventual indemnification: *Provided always*, That if such injured party, his representative, attorney, or agent shall in any way violate any of the provisions of this act by seeking or attempting to obtain private satisfaction or revenge, by crossing over the line on any of the Indian lands, he shall forfeit all claim upon the United States for such indemnification: *And provided also*, That nothing herein con-

tained shall prevent the legal apprehension or arresting, within the limits of any State or district, of any Indian having so offended: *And provided further,* That it shall be lawful for the President of the United States to deduct such sum or sums as shall be paid for the property taken, stolen, or destroyed by any such Indian out of the annual stipend which the United States are bound to pay to the tribe to which such Indian shall belong.

Act of June 30, 1834, section 17 (4 Stat. L., 731)

And be it further enacted, That if any Indian or Indians belonging to any tribe in amity with the United States shall, within the Indian country, take or destroy the property of any person lawfully within such country, or shall pass from the Indian country into any State or Territory inhabited by citizens of the United States, and there take, steal, or destroy any horse, horses, or other property belonging to any citizen or inhabitant of the United States, such citizen or inhabitant, his representative, attorney or agent, may make application to the proper superintendent, agent or subagent, who, upon being furnished with the necessary documents and proofs, shall, under the direction of the President, make application to the nation or tribe to which said Indian or Indians shall belong, for satisfaction; and if such nation or tribe shall neglect or refuse to make satisfaction in a reasonable time, not exceeding twelve months, it shall be the duty of such superintendent, agent, or subagent to make return of his doings to the Commissioner of Indian Affairs, that such further steps may be taken as shall be proper in the opinion of the President to obtain satisfaction for the injury; and, in the meantime, in respect to the property so taken, stolen, or destroyed, the United States guarantee to the party so injured an eventual indemnification: *Provided,* That if such injured party, his representative, attorney, or agent shall in any way violate any of the provisions of this act, by seeking or attempting to obtain private satisfaction or revenge, he shall forfeit all claim upon the United States for such indemnification: *And provided also,* That unless such claim shall be presented within three

years after the commission of the injury, the same shall be barred. And if the nation or tribe to which such Indian may belong receive an annuity from the United States, such claim shall, at the next payment of the annuity, be deducted therefrom and paid to the party injured; and if no annuity is payable to such nation or tribe then the amount of the claim shall be paid from the Treasury of the United States: *Provided*, That nothing herein contained shall prevent the legal apprehension and punishment of any Indians having so offended.

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

MARY E. REX, ADMINISTRATRIX OF JAMES A. IVIE, deceased, appellant,
v.
THE UNITED STATES AND THE UTE INDIANS, appellees.
} No. 126.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES AND THE UTE INDIANS.

STATEMENT.

This is an appeal from the judgment of the Court of Claims dismissing appellant's petition upon demurrer.

The act of March 3, 1891 (26 Stats. 851), commonly known as the Indian depredation act, provides among other things that the Court of Claims shall have jurisdiction "to inquire into and finally adjudicate * * * all claims of the following classes:

> First. All claims for property of *citizens* of the United States taken or destroyed by Indians belonging to any *band, tribe or nation* in amity with the United States * * *.
>
> * * * * *

> SEC. 2. * * * : *And provided further*, That all claims existing at the time of the taking effect of this Act shall be presented to the court by petition, as hereinafter provided, *within three years after the passage hereof, or shall be thereafter forever barred.* (Italics ours.)

Under this act James A. Ivie, deceased, appellant's intestate, filed his petition, No. 702, in the Court of Claims on April 16, 1891, alleging that on June 10, 1866, in Millard County, Utah, the Uintah Ute Tribe of Indians took and destroyed property belonging to him of the value of $22,780. (R. pp. 2, 4.) The proof established that the depredation was committed by Indians known as "Black Hawk's Band," and the petition was dismissed by the Court of Claims on June 13, 1898, for want of jurisdiction under the authority of the holding in *Herring's Case* (32 Ct. Cls. 536), that these Indians constituted a "band" within the meaning of the act of March 3, 1891, and that the band was hostile at the date of the depredation alleged. (R.p. 2.)

By the act of January 11, 1915 (38 Stats. 791), Congress amended the "first section of paragraph one" of the act of March 3, 1891, so as to read:

> First. That in all claims for property of *citizens or inhabitants* of the United States * * * taken or destroyed by Indians belonging to any *tribe* in amity with and subject to the jurisdiction of the United States * * * and in all adjudications under said Act as now amended, *the alienage of the claim-*

> *ant shall not be a defense* to said claim * * * : *Provided further,* That *all cases* heretofore filed under said Act of March third, eighteen hundred and ninety-one, and *which have been dismissed by the court for want of proof of the citizenship of the claimant or alienage shall be reinstated* and readjudicated in accordance with the provisions of this act: *Provided further,* That nothing in this act shall be construed to authorize the presentation of any other claims than those upon which suit has heretofore been brought in the Court of Claims * * * . (Italics ours.)

The act of March 3, 1891 (26 Stat., 851), and the foregoing amendment thereto appear in full as an appendix to this brief.

On September 21, 1917, the administratrix of James A. Ivie filed her petition No. 10842 in the Court of Claims (R. 1–3) setting forth the same depredation and loss, the filing of the former suit by James A. Ivie, its dismissal by the Court of Claims on account of hostility of Black Hawk's band, the amendment of January 11, 1915, to the act of March 3, 1891, and praying (R. 3)—

> that the said claim, No. 702, heretofore dismissed, be consolidated with this suit, and all papers filed therein be transferred to the files in this case; and that upon a final hearing hereof, and upon this petition, and upon the evidence heretofore taken and filed in No. 702, that judgment be awarded her as administratrix as aforesaid, and against the Ute tribe of Indians and the United States for the sum of $22,780.

To this petition defendants demurred, and on March 18, 1918, the petition was dismissed, the court holding that it was without jurisdiction.

Under the original act of March 3, 1891, the Court of Claims had jurisdiction only in cases where the claimant was a *citizen* of the United States at the time of the alleged depredation (*Johnson* v. *The United States et al.*, 160 U. S. 546), and where his property was taken by Indians belonging to a *band*, tribe or nation in amity with the United States. By the amendment of January 11, 1915, the words "band" and "or nation" were omitted from the first paragraph, and the word "inhabitants" was inserted. The provision was also added that "the alienage of the claimant shall not be a defense." The appellees admit that under this act the Court of Claims has jurisdiction over all claims *pending* at the time of the passage of the amendment if the claimant were a citizen or inhabitant of the United States at the time of his losses and if his property had been taken by Indians belonging to a *tribe* in amity with the United States, and even possibly where the depredators constituted a hostile *band* but were in fact members of a *tribe* then in amity, but maintain that upon all other claims, including claims which had been adjudicated by the court and which had thus passed from its jurisdiction, the act of January 11, 1915, has no effect. That the express provision found in the second proviso authorizing the reinstatement and readjudication of all cases theretofore filed under the act of March 3, 1891, "which have been dismissed

by the court for want of proof of the citizenship of the claimant or alienage" is exclusive and controlling.

Appellees contend that the sole object of the amendment of January 11, 1915, was to confer upon the Court of Claims jurisdiction over any claims which might still be pending at the time of its passage where the claimant was merely an inhabitant of the United States and to provide for the reinstatement and readjudication of claims which had theretofore been dismissed "for want of proof of the citizenship of the claimant"; that it conferred no power upon the Court of Claims to reinstate any other class or classes of cases, and that it prohibited that court from receiving new petitions, whether the claims embodied in such petitions had been presented under the original act or not. Even if the elimination of the word "band" from the act authorizes the Court of Claims, in cases pending when the amendment was adopted to render judgments in favor of claimants whose property had been taken by hostile "bands" belonging to "tribes" in amity, whereas if tried under the original act their petitions must have been dismissed; and if a citizen's case tried under the original act was dismissed because the depredators were members of a hostile "band," and such citizen is remediless under the amendment, while his neighbor, an alien, whose case was dismissed for want of proof of citizenship can now have his case reinstated and passed to judgment in his favor, these are results which if unjust Congress alone can remedy.

The appellant contends that by the act of January 11, 1915, a new jurisdiction was conferred upon the Court of Claims, covering two classes of cases, viz, (1) cases where the claimants were inhabitants merely of the United States, and (2) cases where their losses had been at the hands of Indians belonging to hostile bands (appellant's brief, pp. 6–7); that under the amendment the court has power to adjudicate cases in these classes pending at the time of the passage of the amendment, and cases in these classes which had been dismissed prior to the amendment, or to require the filing of new petitions (Rec., pp. 16, 17); that if such petitions were filed within three years after the passage of this amendatory act (this being the limitation set forth in the act of March 3, 1891) or within six years thereafter (this being the limitation set forth in section 156 of the Judicial Code) the court has jurisdiction (Rec., pp. 8, 10, 18). Appellant further contends that the proviso in the amendment—

> that all cases heretofore filed under said act of March 3, 1891, and which have been dismissed by the court for want of proof of the citizenship of the claimant or alienage shall be reinstated and readjudicated in accordance with the provisions of this act,

is limited in its operation to the class of cases mentioned, does not restrict the jurisdiction of the court to that class alone (Rec., p. 16), should be rejected as repugnant to the enacting clause if it has that effect (Rec., pp. 19, 20), in fact, is unneces-

sary (Rec., p. 16); and that therefore, as set out in his assignments of error (Rec., p. 8) the court below erred in sustaining the defendants' demurrer and dismissing the petition.

The sole question involved in this appeal is whether Congress, by the amendatory act intended that the Court of Claims should have jurisdiction, not only of the hundreds of cases dismissed because the claimants were not citizens of the United States, but of the nearly equal number of cases where the depredations had been committed by hostile "bands," with power to reinstate (expressly given with respect to the first class) all cases of both classes which had been dismissed prior to the enactment of the statute; or whether it intended to grant jurisdiction over the claims of inhabitants alone with power expressly given to reinstate all claims that had been dismissed on the ground of alienage prior to the passage of the amendment.

ARGUMENT.

I.

The jurisdiction of the Court of Claims over a case or class of cases must appear clearly in the statute and will not be implied.

The jurisdiction of the Court of Claims over the case at bar, if such exists, must appear clearly in the act of January 11, 1915, and will not be implied (*Blackfeather* v. *United States*, 190 U. S. 368, 376). The act of January 11, 1915, unlike the ordinary remedial statute, must be strictly construed. (*Price* v. *United States and Osage Indians*, 174 U. S. 373, 375, 376.)

II.

The express provision for the reinstatement of one class of cases adjudicated under the original statute precludes the reinstatement of all others.

Appellant contends that under the first clause of the amendatory act the Court of Claims was granted jurisdiction "to inquire into and finally adjudicate" two classes of cases never before within its jurisdiction, and that under that grant it could either order the reinstatement of all such cases that had been dismissed under prior adjudications, or could require the filing of new petitions. The first clause grants no power of reinstatement at all; that grant is found solely in the second proviso.

> *Provided further*, That all cases heretofore filed under said act of March third, eighteen hundred and ninety-one, and which have been dismissed by the court for want of proof of the citizenship of the claimant or alienage, shall be reinstated and readjudicated in accordance with the provisions of this act.

Why should Congress legislate *expressly* with reference to one class and leave to inference the *manner* in which the court was to acquire jurisdiction over another class nearly as numerous and equally as important?

The language is plain; the power to reinstate is granted and that power is restricted to those cases which had been previously dismissed for "want of proof of the citizenship of the claimant."

The fact that Congress provided *in the act* the method by which cases of the class to be benefited

but previously dismissed were to be revived, i. e., by reinstatements of the petitions, shows conclusively that there was no intention of conferring the power to receive new petitions or revive claims in any manner other than by the reinstatement of the original petition.

That this was the intention of Congress is also apparent by reference to the report of the committee upon the bill; not one word appears therein with reference to "band" cases. The whole tenor of the report is directed solely to the subject of citizenship. The committee says:

> The bill provides for the reinstatement of such cases as may have been dismissed by the Court of Claims upon the jurisdictional ground of noncitizenship. * * * If the law is amended as requested, it will merely restore the original promise of indemnification to inhabitants as well as citizens who have filed their claims in the Court of Claims and whose claims have been dismissed by reason of their failure to establish their citizenship. (S. Rept. No. 720, 63d Cong., 2d sess.)

If Congress had intended to confer jurisdiction over hostile "band" cases it would have expressed that intention as clearly and unmistakably as it did with reference to noncitizenship cases.

III.

The Purpose of the Amendment.

Appellant has entirely misunderstood the purpose of the amendment. It is, in fact, an act providing

for reinstatement of cases of claimants whose petitions have been dismissed for failure to prove citizenship, and, in order to do this effectively, it not only provides for reinstatement, but takes away a defense successfully interposed by the Government to claims brought under the original act, namely, that of alienage. It confers no new jurisdiction except to readjudicate reinstated cases, as it expressly provides against bringing new suits. The power of the court to consider pending cases under the original act existed and was not conferred by the amendment. Its only effect on these cases is to relieve the claimant from proving citizenship.

The real enactment is in fact the second proviso, which grants the power to reinstate citizenship cases; the first clause of the amendment is one sentence, the subject of which is a certain defense, namely, "the alienage of the claimant," and the effect of the sentence is to take away this defense in pending and reinstated cases.

The Court of Claims had jurisdiction under the original act of both citizenship and amity cases; that is, to try and to determine the jurisdictional facts, jurisdictional in that the court could grant no relief if, upon traverse in any given case, the claimant was found not to be a citizen, or his loss was occasioned by Indians belonging to any hostile "band, tribe, or nation."

Considering jurisdiction in this sense, then the first paragraph of the amendment gives the Court of Claims jurisdiction over alienage cases,—that is, it

provides that alienage shall not be a defense, yet the third provisio strictly limits this jurisdiction to claims upon which suit has theretofore been brought in the Court of Claims, thus forbidding the bringing of new suits. Under this proviso suits pending in the Court of Claims could proceed, the defense of alienage being expressly taken away; and, perhaps, by implication, the defense of hostility of the band. There were, at the time of the passage of the amendment, suits of this character pending. The second proviso as to reinstatement was necessary because the seventh section of the act of March 3, 1891 (26 Stat., 851), provided:

> That all judgments of said court shall be a final determination of the causes decided and of the rights and obligations of the parties thereto, and shall not thereafter be questioned unless a new trial or rehearing shall be granted by said court, or the judgment reversed or modified upon appeal as hereafter provided.

And the claims of noncitizens, which had been denied by the Court of Claims under the original statute, were ended; no new suit could be begun, and the only way in which the additional relief could be afforded which Congress intended was by reinstatement; therefore, the second proviso was inserted. There is no such proviso as to amity cases and appellant's case, by the terms of the amendment itself, can not be reinstated. His case not coming within the proviso as to reinstatement, if regarded as a new case, is barred by the limitation of the statute

which still stands. If regarded as the same case it is barred as having been finally adjudicated under section 7 of the original act, which is still in effect.

The most that can possibly be said is that because Congress has expressly authorized the reinstatement of cases dismissed on the ground of alienage, it should be held by implication that cases dismissed on the ground of hostility of the band should also be reinstated, because otherwise the one class of claimants is discriminated against. Even if there were language in the statute warranting such implication still that would not be sufficient to authorize the reinstatement of appellant's case. (*Black Feather* v. *United States*, 190 U. S., 368, 376; *Price* v. *United States and Osage Indians*, 174 U. S., 373, 375, 376.)

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the judgment of the Court of Claims should be affirmed.

FRANK DAVIS, JR.,
Assistant Attorney General.

GEO. T. STORMONT,
Attorney.

APPENDIX.

CHAPTER 538.—AN ACT TO PROVIDE FOR THE ADJUDICATION AND PAYMENT OF CLAIMS ARISING FROM INDIAN DEPREDATIONS.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in addition to the jurisdiction which now is, or may hereafter be, conferred upon the Court of Claims, said court shall have and possess jurisdiction and authority to inquire into and finally adjudicate, in the manner provided in this act, all claims of the following classes, namely:

First. All claims for property of citizens of the United States taken or destroyed by Indians belonging to any band, tribe, or nation in amity with the United States without just cause or provocation on the part of the owner or agent in charge, and not returned or paid for.

Second. Such jurisdiction shall also extend to all cases which have been examined and allowed by the Interior Department and also to such cases as were authorized to be examined under the act of Congress making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes for the year ending June thirtieth, eighteen hundred and eighty-six, and for other purposes, approved March third, eighteen hundred and eighty-five, and under subsequent acts, subject, however, to the limitations hereinafter provided.

Third. All just offsets and counterclaims to any claim of either of the preceding classes which may be before such court for determination.

SEC. 2. That all questions of limitations as to time and manner of presenting claims are hereby waived, and no claim shall be excluded from the jurisdiction of the court because not heretofore presented to the Secretary of the Interior or other officer or department of the Government: *Provided*, That no claim accruing prior to July first, eighteen hundred and sixty-five, shall be considered by the court unless the claim shall be allowed or has been or is pending, prior to the passage of this act, before the Secretary of the Interior or the Congress of the United States, or before any superintendent, agent, subagent, or commissioner authorized under any act of Congress to enquire into such claims; but no case shall be considered pending unless evidence has been presented therein: *And provided further*, That all claims existing at the time of the taking effect of this act shall be presented to the court by petition, as hereinafter provided, within three years after the passage hereof, or shall be thereafter forever barred: *And provided further*, That no suit or proceeding shall be allowed under this act for any depredation which shall be committed after the passage thereof.

SEC. 3. That all claims shall be presented to the court by petition setting forth in ordinary and concise language, without unnecessary repetition, the facts upon which such claims are based, the persons, classes of persons, tribe or tribes, or band of Indians by whom the alleged illegal acts were committed, as near as may be, the property lost or destroyed, and the value thereof, and any other facts connected with the transactions and material to the proper adjudica-

tion of the case involved. The petition shall be verified by the affidavit of the claimant, his agent, administrator, or attorney, and shall be filed with the clerk of said court. It shall set forth the full name and residence of the claimant, the damages sought to be recovered, praying the court for a judgment upon the facts and the law.

SEC. 4. The service of the petition shall be made upon the Attorney General of the United States in such manner as may be provided by the rules or orders of said court. It shall be the duty of the Attorney General of the United States to appear and defend the interests of the Government and of the Indians in the suit, and within sixty days after the service of the petition upon him, unless the time shall be extended by order of the court made in the case, to file a plea, answer, or demurrer on the part of the Government and the Indians, and to file a notice of any counterclaim, set-off, claim of damages, demand, or defense whatsoever of the Government or of the Indians in the premises: *Provided*, That should the Attorney General neglect or refuse to file the plea, answer, demurrer, or defense as required, the claimant may proceed with the case under such rules as the court may adopt in the premises; but the claimant shall not have judgment for his claim, or for any part thereof, unless he shall establish the same by proof satisfactory to the court; *Provided*, That any Indian or Indians interested in the proceedings may appear and defend, by an attorney employed by such Indian or Indians, with the approval of the Commissioner of Indian Affairs, if he or they shall choose so to do.

In considering the merits of claims presented to the court, any testimony, affidavits, reports of special agents or other officers, and such other

papers as are now on file in the departments or in the courts, relating to any such claims, shall be considered by the court as competent evidence and such weight given thereto as in its judgment is right and proper: *Provided*, That all unpaid claims which have heretofore been examined, approved, and allowed by the Secretary of the Interior, or under his direction, in pursuance of the act of Congress making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the year ending June thirtieth, eighteen hundred and eighty-six, and for other purposes, approved March third, eighteen hundred and eighty-five, and subsequent Indian appropriation acts, shall have priority of consideration by such court, and judgments for the amounts therein found due shall be rendered, unless either the claimant or the United States shall elect to reopen the case and try the same before the court, in which event the testimony in the case given by the witnesses and the documentary evidence, including reports of department agents therein, may be read as depositions and proofs: *Provided*, That the party electing to reopen the case shall assume the burden of proof.

SEC. 5. That the said court shall make rules and regulations for taking testimony in the causes herein provided for by deposition or otherwise, and such testimony shall be taken in the county where the witness resides, when the same can be conveniently done, and no person shall be excluded as a witness because he is party to or interested in said suit, and any claimant or party in interest may be examined as a witness on the part of the Government; that the court shall determine in each case

the value of the property taken or destroyed at the time and place of the loss or destruction, and, if possible, the tribe of Indians or other persons by whom the wrong was committed, and shall render judgment in favor of the claimant or claimants against the United States, and against the tribe of Indians committing the wrong, when such can be identified.

SEC. 6. That the amount of any judgment so rendered against any tribe of Indians shall be charged against the tribe by which, or by members of which, the court shall find that the depredation was committed, and shall be deducted and paid in the following manner: First, from annuities due said tribe from the United States; second, if no annuities are due or available, then from any other funds due said tribe from the United States, arising from the sale of their lands or otherwise; third, if no such funds are due or available, then from any appropriation for the benefit of said tribe, other than appropriations for their current and necessary support, subsistence, and education; and, fourth, if no such annuity fund, or appropriation is due or available, then the amount of the judgment shall be paid from the Treasury of the United States: *Provided*, That any amount so paid from the Treasury of the United States shall remain a charge against such tribe, and shall be deducted from any annuity, fund, or appropriation hereinbefore designated which may hereafter become due from the United States to such tribe.

SEC. 7. That all judgments of said court shall be a final determination of the causes decided and of the rights and obligations of the parties thereto, and shall not thereafter be questioned unless a new trial or rehearing shall be granted by said court, or the judg-

ment reversed or modified upon appeal as hereafter provided.

SEC. 8. That immediately after the beginning of each session of Congress the Attorney General of the United States shall transmit to the Congress of the United States a list of all final judgments rendered in pursuance of this act in favor of claimants and against the United States and not paid as hereinbefore provided, which shall thereupon be appropriated for in the proper appropriation bill.

SEC. 9. That all sales, transfers, or assignments of any such claims heretofore or hereafter made, except such as have occurred in the due administration of decedents' estates, and all contracts heretofore made for fees and allowances to claimant's attorneys, are hereby declared void, and all warrants issued by the Secretary of the Treasury, in payment of such judgments, shall be made payable and delivered only to the claimant or his lawful heirs, executors, or administrators, or transferee under administrative proceedings, except so much thereof as shall be allowed the claimant's attorneys by the court for prosecuting said claim, which may be paid direct to such attorneys, and the allowances to the claimant's attorneys shall be regulated and fixed by the court at the time of rendering judgment in each case and entered of record as part of the findings thereof; but in no case shall the allowance exceed fifteen per cent of the judgment recovered, except in case of claims of less amount than five hundred dollars, or where unusual services have been rendered, or expenses incurred by the claimant's attorney, in which case not to exceed twenty per cent of such judgment shall be allowed by the court.

SEC. 10. That the claimant, or the United States, or the tribe of Indians, or other party thereto interested in any proceeding brought under the provisions of this act, shall have the same rights of appeal as are or may be reserved in the statutes of the United States in other cases, and upon the conditions and limitations therein contained. The mode of procedure in claiming and perfecting an appeal shall conform, in all respects, as near as may be, to the statutes and rules of court governing appeals in other cases.

SEC. 11. That all papers, reports, evidence, records, and proceedings now on file or of record in any of the departments, or the office of the Secretary of the Senate, or the office of the Clerk of the House of Representatives, or certified copies of the same, relating to any claims authorized to be prosecuted under this act, shall be furnished to the court upon its order or at the request of the Attorney General.

SEC. 12. To facilitate the speedy disposition of the cases herein provided for in said Court of Claims, there shall be appointed, in the manner prescribed by law for the appointment of Assistant Attorneys General, one additional Assistant Attorney General of the United States, who shall receive a salary of twenty-five hundred dollars per annum.

SEC. 13. That the investigation and examinations, under the provisions of the acts of Congress heretofore in force, of Indian depredation claims shall cease upon the taking effect of this act, and the unexpended balance of the appropriation therefor shall be covered into the Treasury, except so much thereof as may be necessary for disposing of the unfinished business pertaining to the claims now under investigation in the Interior Department, pending the trans-

fer of said claims and business to the court or courts herein provided for, and for making such transfers and a record of the same, and for the proper care and custody of the papers and records relating thereto.

Approved, March 3, 1891.

(26 Stats. 851.)

CHAPTER 7.—AN ACT TO AMEND AN ACT ENTITLED "AN ACT TO PROVIDE FOR THE ADJUDICATION AND PAYMENT OF CLAIMS ARISING FROM INDIAN DEPREDATIONS," APPROVED MARCH 3, 1891.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the first section of paragraph one of an act entitled "An act to provide for the adjudication and payment of claims arising from Indian depredations," approved March third, eighteen hundred and ninety-one, be, and the same is hereby, amended so as to read as follows:

> First. That in all claims for property of citizens or inhabitants of the United States, except the claims of Indians heretofore or now in tribal relations, taken or destroyed by Indians belonging to any tribe in amity with and subject to the jurisdiction of the United States without just cause or provocation on the part of the owner or agent in charge, and not returned or paid for, and in all adjudications under said act as now amended, the alienage of the claimant shall not be a defense to said claim: *Provided*, That the privileges of this act shall not extend to any person whose property at the time of its taking was unlawfully within the Indian country: *Provided further*, That all cases heretofore filed under said act of March third, eighteen hundred and ninety-

one, and which have been dismissed by the court for want of proof of citizenship of the claimant or alienage shall be reinstated and readjudicated in accordance with the provisions of this act: *Provided further*, That nothing in this act shall be construed to authorize the presentation of any other claims than those upon which the suit has heretofore been brought in the Court of Claims: *Provided further*, That all acts and parts of acts in so far as they conflict with the provisions of this act are hereby repealed.

Approved, January 11, 1915.

(38 Stats. 791.)

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